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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 71

SARAH ELIZABETH STRINGFELLOW, A WIDOW,
PETITIONER,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
A CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.

Opinion and Judgment Below.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Circuit Judges Bryan, Sibley and Hutcheson, Judge Bryan writing, Judge Hutcheson dissenting and writing a separate opinion) is reported in 64 Fed. (2) 173, and appears at pages 93 and 98 of the record.

II.

Jurisdiction.

Writ of certiorari was granted October 9, 1933.

III.

Statement of the Case.

Petitioner, in her own right as widow and as administratrix, on May 25, 1931, brought five separate actions in the District Court of the United States for the Southern District of Florida, Tampa Division (R. 28, 11, 19, 2, 35), against the railroad company for negligently running its train upon and fatally injuring her husband and two minor children at a street crossing in the city of Dunedin, Florida. A satisfactory statement of facts is found in the opinion of the circuit court of appeals (R. 93-95), which we quote, but to which we have added in brackets the record page references of the facts thus recited:

> "The accident, which resulted in the injuries alleged, occurred in the daytime at a grade crossing where Scotland Street intersects the railroad right-of-way at right angles; the street extending east and west and the right-of-way north and south (R. 56). On the right-of-way the main line was flanked on either side by a side track (R. 64). To the south of the crossing the main line was straight for a mile or more, but the view in that direction of one going east on the street was cut off by trees until the west side track, within 20 feet of the main line, was reached, at which point the view to the south was open and unobstructed (R. 61, 86 and photographs). At the time of the accident appellant's husband was driving his automobile, in which his children, one seven, and the other nine, years of age, were riding with him, toward the east across the intersection; and the train was coming from the

south. The train was a few minutes late (R. 60, 67) and was not due to stop at Dunedin (R. 85). A strong wind from the northwest interfered with the hearing of anyone at the crossing who might be listening for the rumble of the train, or for any warning that might have been given by whistle or bell (R. 60, 74). The evidence was in hopeless conflict as to whether the whistle was sounded or the bell was rung, and also as to the the speed of the train. Several witnesses for appeliant who were near the place of the accident and in position to hear testified that they heard no whistle or bell; and they gave various estimates of the rate of speed, ranging from 30 to 50 miles per hour (R. 56, 57, 58, 60, 62, 63, 88). Two of these witnesses cited as evidence of their ability to estimate speed speedometer tests which they had made, while traveling by automobile on highways parallel with railroad tracks, of the speed of trains going in the same direction as they were (R. 56, 59). On the other hand witnesses for appellee, particularly the engineer (R. 64), fireman (R. 67) and members of the train crew (R. 81, 84), testified that as the train approached Scotland Street the last four blasts of the whistle was sounded, and that the bell was being rung by an automatic bell ringer from the time the train reached the fourth street south of Scotland Street until after the accident. Members of the train crew also testified that the train had slackened speed as it passed through Dunedin, and that it was running at a rate not exceeding 10 or 12 miles per hour as it approached Scotland Street. The fireman (R. 67) testified that he saw appellant's husband drive upon the crossing about 60 feet in front of the engine, and that he called to the engineer, who immediately put on the emergency brakes as soon as the fireman called out to him and stopped the train as quickly as possible. The engine proceeded about 100 yards north of Scotland Street before it was brought to a standstill (R. 62). Several witnesses for appellee testified that appellant's husband drove across the intersection at a speed of 10 or 15 miles per hour (R.

68, 80); but the testimony as a whole leaves it uncertain whether he stopped or slackened speed when he arrived at the crossing, and whether he actually saw the train."

By direction of the district judge the cases were consolidated for trial (R. 54).

Negligence of the railroad company was alleged in failing to give warning of the approach of the train by sounding the whistle or ringing the bell of the engine and in running the train upon the street crossing at a dangerous rate of speed (R. 28). The railroad company pleaded not guilty (R. 35).

At the close of all the evidence the district court directed a verdict for the railroad company upon the ground that the injuries complained of were caused solely by the negligence of the petitioner's husband, driver of the automobile (R. 88–89).

In each case separate verdicts (R. 45–46) and judgments were entered (R. 46–49) and on the 20th day of April, 1932, separate appeals were taken to the Circuit Court of Appeals for the Fifth Circuit (R. 50–51), but on a single transcript and were docketed in the circuit court of appeals as one case, argued as one case, and were disposed of by a single written opinion. The judgments appealed from were reversed on March 31, 1933, as to all actions *except* the one brought by petitioner in her own right as widow for the death of her husband (R. 104). On April 21, 1933, the circuit court of appeals entered an order granting petitioner's motion for a severance from all of her co-appellants for the purpose of filing a petition in this Court for a writ of certiorari (R. 115–116).

The circuit court of appeals, in its opinion, 64 Fed. (2d) 173 (R. 93), said in part (R. 95–96, 97):

"In so far as the case depends upon appellant's right to recover for the death of her husband, we are of

opinion that it was not error to direct a verdict for appellee. Her husband, as driver of the automobile was under the duty to exercise the care and caution which a reasonably prudent man would have displayed under same or similar circumstances. It therefore was his duty to use his senses of sight and hearing before undertaking to cross the railroad tracks. If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision. A careful and prudent driver of an automobile would not under the circumstances have undertaken to drive over the crossing in front of the approaching train. Notwithstanding Paragraph 7052 he could not have recovered for an injury, and so recovery cannot be had on account of his death. * * *. In our opinion the right of recovery for the deaths of the children should have been submitted to the jury. The children were guilty of no negligence; and their father's negligence could not be imputed to them. The judgment is defended as to them only on the theory that the father's negligence was the sole proximate cause of their deaths. But the jury might reasonably have concluded that their deaths were caused by the combined or concurrent negligence of their father and the railroad company. There was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong head-wind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was opened for the jury to find that appellant's husband did not know or realize that a

train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

IV

Specification of Errors.

The circuit court of appeals erred:

1. In holding that petitioner could not recover damages for the death of her husband under Section 7052, Compiled General Laws of Florida, 1927, notwithstanding the fact that the evidence did not establish as a matter of law that the husband's negligence was the sole proximate cause of the injury, but no more than a concurring proximate cause.

2. In holding that petitioner was not entitled to have the question of her right of recovery for the death of her husband submitted to the jury.

V.

Statutes Involved.

Compiled General Laws of Florida, 1927, provide:

> "A railroad company shall be liable for any damage done to persons, stock or other property, by the running of the locomotives, or cars, or other machinery of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." Section 7051.
>
> "No person shall recover damages from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault the former may recover, but the damages shall be diminished or increased by the jury in proportion to the amount of default attributable to him." Section 7052.

VI.

ARGUMENT.

Can damages be recovered against a railroad company under Sections 7051 and 7052, Compiled General Laws of Florida, 1927 for the death of a driver of an automobile at a railroad and street intersection where the view at the crossing is obstructed and where it appears that both the driver of the automobile and the railroad company were negligent?

The circuit court of appeals has answered the question in the negative. The decision in this case holds that by reason of the failure of Stringfellow to see the train, "when he had passed the trees and had an open view down the track" (R. 96) petitioner, "notwithstanding paragraph 7052" (R. 96) could not recover for his death, yet the court also holds with reference to petitioner's right to recover for the death of the children that "the jury might have reasonably concluded that their deaths were caused by the combined or concurring negligence of their father and the railroad company" (R. 96) and held that it appeared by the record that there was substantial evidence of the railroad company's negligence and it was a question for the jury to determine. On the other hand, the Supreme Court of the State of Florida has uniformly held that damages could be recovered for injury to the driver of an automobile where the injury was caused by the "combined or concurrent negligence" of the driver and the railroad company:

> "Under the laws of Florida, where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his sake as are reasonably required by the existing circumstances, he is negligent

so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death *in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties.*

Florida East Coast Railroad Company v. *Townsend,* 140 So. 196, 198, *and cases cited therein.*

If the decision of the circuit court of appeals is to stand, one rule will prevail in the Federal Courts in Florida on the question, while a different rule will prevail in the State courts. This question, we contend, should be decided in accordance with the meaning and effect given to the words of the Statute by the Florida Supreme Court.

"The laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." *Revised Statutes Sec.* 721, 28 U. S. C. A. Sec. 725. This Court said in *Benedict* v. *Ratner,* (1925), 268 U. S. 353, 45 Sct. 566, 69 L. Ed. 991:

> "No case yet has gone to the length of undertaking to correct the construction of state laws by state courts. The exclusive authority to enact those laws carries with it the final authority to say what they mean."

It must therefore be determined first, whether the evidence was sufficient for the jury to reasonably have concluded that "some appreciable negligence of the railroad company's agent proximately contributed to such injury or death" (*Florida East Coast Railroad Company* v. *Townsend, supra*); and second, what is the effect of the Florida statute when the injury or death was caused by the

combined or concurrent negligence of driver of the car and the railroad company.

1. Was the evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of petitioner's husband?

The plaintiff introduced evidence, which if believed by the jury, was sufficient to establish negligence upon the part of the railroad company. The train was running late (R. 60). One block from where the accident occurred it was traveling between 40 and 50 miles an hour (R. 57). The bell was not ringing and the whistle was not blowing (R. 57, 59). The speed of the engine when it reached Scotland Street, according to one witness, was 35 to 40 miles an hour (R. 57), another placed the speed between 40 and 50 miles an hour (R. 59) and another placed the speed between 40 and 50 miles an hour (R. 87, 88). In addition to this it was established by uncontroverted testimony that the accident happened on one of the main thoroughfares of the city of Dunedin, at a populous section of the city, and that Scotland Street crossing was one that is constantly and habitually used by the people in crossing and recrossing the railroad tracks; and that in approaching the railroad tracks in an easterly direction along Scotland Street intervening objects prevent the view of an approaching train from the south until a person is "on the side-track" (R. 61, 86).

This testimony, if true, was clearly sufficient to establish negligence upon the part of the railroad company and the case should have been submitted to the jury. In addition to the testimony of the plaintiff, the testimony of the defendant's chief witness, Mabel L. Seeley (R. 69) was contradicted by the plaintiff's witnesses, Mrs. George Smart (R. 86) and W. H. James (R. 87). This contradiction was

clearly a question of credibility to be determined by the jury and not by the trial court. Aside from this the defendant's witness, O. C. Howell (R. 74) admitted that he had previously testified at a coroner's inquest contrary to the facts he testified about at the trial of the case, and the same is true of the defendant's witness, J. C. Hill (R. 80); and the defendant's witness, Roy Outing (R. 79), testified that the whistle did not blow within two blocks south of Scotland Street and "all I heard that the train was doing was the bell ringing." It, therefore, appears that there was a conflict in the testimony, not only between the witnesses for the plaintiff and the defendant, but also there was a conflict in the testimony of the defendant's witnesses.

The fourth count in each of the declarations alleged that at the time there was a strong wind blowing from the northwest and that the defendant failed to give suitable and proper warnings of the approach of the train and failed to use such ordinary precaution as the exigencies of the circumstances required. The failure of the defendant to give suitable and proper warning of its approach was developed from the testimony of the defendant's witness, O. C. Howell (R. 74), who testified that: "The wind was blowing and if you were not paying close attention you might not hear the whistle blow. If you were standing out in the open you could hear it" (R. 77). The whistle referred to by this witness was an air whistle. This witness admitted that the steam whistle did not blow after it passed the water tank a mile or so south of where the accident occurred. It is the contention of the petitioner that it was negligence on the part of the defendant under the circumstances, to blow an air whistle, the sound of which was obstructed by the wind and that this was not a suitable and proper warning of the approach of the train. Most all of the witnesses testified to hearing a steam whistle on the

train when it was some distance from where the accident occurred, while the train crew testified that the steam whistle was blowing. Yet two of the defendant's witnesses, O. C. Howell (R. 74) and J. O. Hill (R. 80) testified or admitted that they had previously testified that the whistle referred to by the defendant's other witnesses was an air whistle. If it be true that only an air whistle was blown as this train approached Scotland Street, and traveling at the rate of speed fixed by the plaintiff's witnesses and the sound of the air whistle was obstructed by the wind, we submit that this establishes negligence on the part of the railroad company in failing to give suitable and proper warning of the approach of the train. Conflict in the testimony as to the speed of the train and the failure to give warning of its approach should have been submitted to the jury. It is purely a question of fact to be determined by a jury and not by the court in peremptorily directing a verdict to be returned for the defendant.

The trial court, therefore, infringed upon the plaintiff's right to have this case submitted to a jury by directing a verdict for the defendant. The trial judge in granting the motion for a directed verdict admitted that there was a conflict as to the negligence alleged in the declaration and refused to allow the case to go to a jury because: "I am under my oath as judge to decide one way or another as it appears to me. I cannot see that there is any negligence here upon the part of the railroad and that it in any way contributed to this unfortunate accident; therefore you may prepare a verdict in each one of the cases" (R. 90). And in directing the jury to return a verdict, the trial court further stated: "In this court the judge is required to assume some responsibility. He is not the mere referee of a fair fight to sit up here and let the jury pass upon the questions, and the court has decided that under all of the

evidence here as a matter of law that neither of these plaintiffs could recover against the railroad company" (R. 90). It appears further from the trial court's statements in granting the defendant's motion for a directed verdict that the trial court even went so far to pass upon the credibility of the plaintiff's witnesses, as is disclosed by the following statement: "Now the testimony that put it up around 50 or 60 miles an hour just shows that they did not know what they were talking about. If they had put it above 30 they would not know what they were taking about. They stretched it too much. They overreached themselves" (R. 90). It therefore appears from the foregoing that the trial court assumed the province of the jury to pass upon conflicting testimony and the credibility of the witnesses. This is clearly contrary to well established doctrine. "Issues that depend on the credibility of witnesses and the effect and weight of evidence are to be decided by the jury * * * Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair minded men may honestly draw different conclusions from them, the question is not one of law but of fact, to be settled by the jury." *Richmond & Danville Ry. Co.* v. *Powers,* 149 U. S. 43, 45.

It will be observed, upon the reading of the record in this case, that all of the defendant's witnesses who testified as to the speed of the train and the blowing of the whistle, were in the employ of the defendant, except the witness Baldwin (R. 78), Howell (R. 74), and Roy Outing (R. 79). The witness Baldwin was not in a position to testify with any degree of certainty as to the position of the train at the time the alleged signals were given, nor concerning the speed of the train. Howell's testimony was admitted by him to be untrue. On the other hand, the defendant's witness, Roy Outing, testified positively that the whistle did

not blow within two blocks from the point where the collision occurred. Conflict in the testimony of the defendant's witnesses as to whether warning signals were given was sufficient to submit that issue to the jury in view of the fact that several of the defendant's witnesses were in the coaches of the train and manifestly were not in a position to testify with any reasonable degree of certainty as to the position of the train at the time the alleged signals were given. The fact that these witnesses were in the employ of the defendant and were to some degree at least interested in the outcome of the case, was sufficient to present the question of their credibility to the determination of the jury:

> "The testimony to the effect that the engine whistle was blown and the bell rung was given by *employees* of appellant, and of course, their interest as such, made their credibility a question of fact for the jury." *Jarrett* v. *Wabash Ry. Co.*, 57 Fed. (2) 669, 671.

It cannot, therefore, be said that there was no evidence to support the contention of respondent's negligence; and this being so the question could not be decided as a matter of law, but one to be submitted to a jury. In view of all the conditions of the entire situation at the time and place of the accident, with a conflict in the evidence over the material facts, the question of respondent's negligence was obviously one for the jury. And since a verdict was directed in favor of respondent (R. 90) this Court must consider the evidence and all reasonable references to be deducted therefrom in the light most favorable to petitioner.

This Court said in *Northern Pacific Railroad* v. *Freeman*, 174 U. S. 379, 381, 19 S. Ct. 763, 764:

> "There was testimony from several witnesses in the neighborhood tending to show that no whistle was

blown by the engineer as the train approached the crossing. There was also the testimony of the conductor, engineer, and firemen that the whistle was blown. As the majority of plaintiff's witnesses were so located that they would probably have heard the whistle if it had blown, there was a conflict of testimony with respect to defendant's negligence, which was properly left to the jury."

In the majority opinion in the court below, the court said (R. 96):

"There was substantial evidence tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was open for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing. The Covington case does not purport in any wise to limit or overrule the earlier case of *S. A. L. Ry.* v. *Watson,* 94 Fla. 571, where it was said 'There may be concurrent causes of a single injury—concurrent negligence of two separate and distinct agencies, which, operating contemporaneously, together constitute the efficient proximate cause of the injury inflicted, and without either one of which the harm would not have been done.'"

If Stringfellow did not see the approaching train, although he might have done so by looking, and, in ignorance of the fact that it was approaching, moved forward ("I thought Mr. Stringfellow saw the train; he drove up pretty close to the tracks and almost stopped, looked south and then north and then speeded ahead to cross. I thought he saw the train, but undoubtedly he did not," R. 73), to the point of collision, the failure of the railroad company to give warning of the approach of the train and its speed under the circumstances, tending to contribute to his ignorance, and therefore to the disaster, would be a proximate cause of the injury. If the railroad company was negligent, the fact that Stringfellow was also negligent is not a determining factor. The negligence of both may have been *concurrent.*

This rule is very aptly stated by the court in the case of *Southern Pac. Co.* v. *Kauffman,* 50 Fed. (2d) 150 (C. C. A., 9), on page 165, where the following instruction was given:

> "If you believe from the evidence that the automobile approached to a point within fifteen feet of the track, slowing down as if to stop, and that from such point the driver of the automobile had a clear and unobstructed view in the direction of the approaching train and that she saw, or had she looked she would have seen, the train approaching when she left such point and proceeded over the railroad crossing in said automobile, then I instruct you that the proximate cause of said collision was the negligence of the driver of said automobile, and your verdicts must be for the defendant, Southern Pacific Company, in both cases.
>
> "(12-14) This instruction, in our view, was erroneous so far as the appellee is concerned, for the reason that in determining whether or not the negligence of the railroad company was the proximate cause of the injury the fact that the driver of the automobile was

also negligent is not a determining factor. The negligence of both may have been concurrent, co-operating to cause the injuries to the appellee. If the driver of the automobile saw the approaching train in time to stop, any negligence of the railroad company in failing to give notice of the approach of the train would no longer be an operating cause for the injury. If, however, she did not see the approaching train, although she might have done so by looking, and, in ignorance of the fact that it was approaching, moved forward to the point of collision, the failure of the railway company to give warning of the approach of the train tending to contribute to her ignorance, and therefore to the disaster, would be a proximate cause of the injury."

The same rule obtains in Florida, as appears from the following decisions of the Florida Supreme Court:

"If the decedent was merely negligent in being on the track at the particular instant, the negligent speed of the train reasonably might have contributed to the causes resulting in the injury, by rendering it impossible for the decedent to get off the track he was crossing in time to avoid injury, even if he knew of the approach of the engine; and under the statute regulating the liability of railroad companies, the plaintiff's negligence reduces, but does not prevent, recovery, when the defendant is also negligent. There was a legal basis in the pleadings and evidence for a finding by the jury that the unlawful and excessive, and consequently negligent, rate of speed of the train in the town, and failure to give warning at the street crossing were a participating proximate cause of the injury. The verdict indicates such a finding. The evidence does not affirmatively show that the decedent's death was 'caused by his own negligence' so as to preclude a recovery under the statute (Section 4965, Rev. Gen. Stats. 1920) and requested charges on the theory that the decedent's own negligence was the sole proximate cause of his death were not erroneously refused, in

view of the evidence as to the absence of signals and of the excessive speed of the train and of all the evidence and the language of the charges as requested. Contributory negligence reduces, but does not bar, a recovery of the damages for a negligent injury by a railroad train."

Director General of Railroads v. *Into*, 91 So. 269, 271.

To the same effect see:

A. Mortellaro & Co. v. *A. C. L. R. R. Co.*, 107 So. 528.
Dina v. *S. A. L. R. R. Co.*, 106 So. 418.
S. A. L. R. R. Co. v. *Watson*, 137 So. 719.

In view of the evidence adduced upon the trial and the findings of fact by the circuit court of appeals, it must follow that there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of respondent contributed to the death of petitioner's husband. It must, therefore, be said that his injury and death was caused by the combined or concurrent negligence of himself and the railroad company. *In fact the circuit court of appeals said so!* If the evidence did not establish, as a matter of law, that Stringfellow's negligence was the sole proximate cause of the death of his children, but the jury from that evidence might reasonably have concluded that their deaths were caused by the combined negligence of their father and the railroad company, then it must follow, as night the day, that the jury might reasonably have concluded that Stringfellow's death was caused by the combined negligence of Stringfellow and the railroad company! This is the only conclusion that can be reached! The separate dissenting opinion of Mr. Justice Hutcheson (R. 98) clearly demonstrates this conclusion. If negligence of the railroad company contributed or concurred in the death of the children, it also contributed

or concurred in the death of Stringfellow! *That negligence cannot vanish by the same proof from which it appeared!* Yet in the face of this conclusion the majority opinion holds that petitioner could not recover for the death of her husband, notwithstanding Section 7052, *supra*. Manifestly the court necessarily founded its opinion upon its finding that within 20 feet from the main line the view to the south was open and unobstructed (R. 94). "If when he had passed the trees and had an open view down the track he had looked he would have seen the train and could have avoided the collision" (R. 96). It is further apparent that the majority opinion based its decision upon the ruling of this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, which the Florida court refused to follow (*Germak* v. *Florida East Coast Ry. Co.*, 95 Fla. 911, 117 So. 391), because of the Florida statute, Section 7052, *supra*. This leads us to the second question presented by the record in this case.

2. What is the effect of the Florida statute, where the injury and death was caused by the combined or concurrent negligence of the driver of the car and the railroad company?

The separate dissenting opinion in the court below (R. 98) very clearly states the conflict of the majority opinion with Section 7052, *supra*, and with the decisions of the Supreme Court of Florida. It must be borne in mind that under this statute and decisions, while *sole negligence* of the driver of an automobile will bar recovery for a crossing injury, *contributory negligence* will not. Under this statute contributory negligence merely diminishes the amount of recovery.

The length of this brief is materially reduced by the separate dissenting opinion of Mr. Justice Hutcheson (R.

98). In addition to the decisions cited by him, in *Seaboard Air Line Ry. Co.* v. *Watson,* 137 So. 719 (decided November 12, 1931), appeal dismissed November 7, 1932, 77 Law Ed. 68, the Florida Supreme Court said, 137 So., at top of page 723:

> "Where injury at a railroad crossing is caused solely by the negligence of a party injured, there can be no recovery; but if the injury was caused by running of the train, and both the injured party and the employees of the company were at fault, there may be a recovery, but damages will be reduced in proportion to contributory negligence. Section 7051 (4964) and Section 7052 (4965), Compiled General Laws of Florida of 1927; *Atlantic Coast Line R. Co.* v. *Watkins, supra* (97 Fla. 350, 121 So. 195); *Germak* v. *Florida East Coast Ry. Co.,* 95 Fla. 991, 117 So. 391; *Louisville & Nashville Ry. Co.* v. *Harrison,* 84 Fla. 479, 94 So. 382; *Tampa Electric Co.* v. *Bryant* (Fla.), 133 So. 887."

Subsequent to that decision the Florida Supreme Court in *Florida East Coast Railroad Company* v. *Townsend,* 140 So. 196, 198, *supra,* reaffirmed the position taken by petitioner in this case, that where a person attempts to drive an automobile over a railroad crossing with which he is familiar, when his view of the railroad track is so obstructed that an approaching train cannot be seen, and he does not stop and look and listen or take such precautions for his safety as are reasonably required by the existing circumstances, he is negligent so as to prevent recovery of damages from a railroad company for his injury or death by being struck by the train, unless some appreciable negligence of the railroad company's agent proximately contributed to such injury or death, in which case the damages awarded should be such a proportion of the entire damages sustained as the defendant's negligence bears to the combined negligence of both parties.

The Florida Supreme Court has recognized the standard of care required of a person in crossing a railroad track as announced by this Court in *B. & O. R. R. Co.* v. *Goodman*, 275 U. S. 66, 48 S. Ct. 24, 72 Law Ed. 167, but has applied it to the Florida statute in a manner different from the majority opinion of the Circuit Court of Appeals in this case. In *Germak* v. *Florida East Coast Ry. Co.*, decided May 30, 1928, 95 Fla. 991, 117 So. 391, at page 392, after quoting the language of Mr. Justice Holmes in the Goodman case, the Florida Supreme Court said:

> "(3) This rule has reference to the standard of conduct required by the law of persons in crossing railroad tracks. It does not relate to the standard of duty imposed upon railroad companies or define the liability of such companies under a statute like the one in Florida which provides that:
>
> "'A railroad company shall be liable for any damage done to persons * * * by the running of the locomotives, or cars * * * unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company. No person shall recover damages from a railroad company for injury to himself or his property * * * caused by his own negligence. If the complainant and the agents are both at a fault, the former may recover, but the damages shall be diminished or increased * * * in proportion to the amount of default attributable to him. Sections 4964, 4965, Rev. Gen. Stats. 1920.'"
>
> "(4, 5) Under the above statutory provisions, the rule announced by the Supreme Court of the United States in the Goodman case, *supra*, may be an appropriate standard of care required of a person in crossing a railroad track, to be applied in actions to recover damages for personal injuries received by collision with a train at a railroad crossing, and neg-

ligence of the injured person may appear from his failure to observe the required standard, which would bar recovery under the law in some states, see *Penn. R. Co.* v. *Rusynik* (Ohio), 159 N. E. 825; yet, under the Florida statute, if an injury is duly alleged and shown to have been caused by the running of a railroad company's train, there may be a recovery for damage done, unless the company shall make it appear that its employees exercised all ordinary and reasonable care and diligence in the premises, *Tampa El. Co.* v. *Bazemore*, 85 Fla. 164, 96 So. 297; but if it appears that the injury was caused solely by the negligence of the party injured, there can be no recovery, *S. A. L. Ry. Co.* v. *Myrick*, 91 Fl., 918, 109 So. 193; *S. A. L. Ry. Co.* v. *Toberlin*, 70 Fla. 435, 70 So. 437; *Tampa El. Co.* v. *Bourquardez*, 72 Fla. 161, 72 So. 668; and, if both the injured and the employees of the railroad company were at fault in causing the injury, there may be a recovery, but the damages will be reduced in proportion to the contributory negligence of the injured party. *L. & N. Ry. Co.* v. *Norton*, 75 Fla. 597, 78 So. 982; *A. C. L. Ry. Co.* v. *Weir*, 63 Fla. 69, 58 So. 641, 41 L. R. A. (N. S.) 307, Ann. Cas. 191A, 126; *Davis* v. *Cain*, 86 Fla. 18, 97 So. 305; *Stevens* v. *Tampa Elec. Co.* 81 Fla. 512, 88 So. 303; *S. A. L. Ry.* v. *Callan*, 73 Fla. 688, 74 So. 799, 35 S. Ct. 654, 59 L. Ed. 1069; Ann. Cas. 1914C, 172, 109 So. 432."

We emphasize the language of Mr. Justice Hutcheson's separate dissenting opinion at Record page 103:

"In *Claughton* v. *Atlantic Coast Ry.*, 47 Fed. (2) 679, this Court correctly announced and applied the Florida rule that while the sole negligence of a father is a bar to recovery for a crossing injury, contributory negligence is not. Such negligence bars neither the driver nor those in the vehicle with him. It merely diminishes the amount of the recovery of those negligent or responsible for the nigligence. *Bradley* v. *Mo. Pac. Ry.*, 288 Fed. 484. The opinion of the ma-

jority advances a third view as maintainable in Florida, that there are degrees of contributory negligence, and that a driver may be so contributory negligent as that though the recovery of those in the car with him will not be barred because his negligence is not the sole but a concurring proximate cause of the injury, his own recovery will be. I find no warrant in the Florida statute nor in any of its decisions, for this view. I think it overrules the Claughton case. I respectfully dissent from it."

It is conceded that the railroad track is a proclamation of danger; that the traveler must stop for the train and not the train for the traveler, but it is not a proclamation that a train will run at a high rate of speed through a thickly settled community and over a much traveled street at 30, 40 or 50 miles per hour, without warning signals of its approach. To drive a train at a high rate of speed across a thoroughfare where the travel is heavy in the center of a town, where the view is obstructed, is undoubtedly an act of negligence. Stringfellow's fate, and that of his children, show the danger of it, and the case should have been submitted to the jury and especially so where there is a conflict in the evidence as to whether or not the whistle was blown. The Florida Supreme Court said in *Atlantic Coast Line R. R. Co.* v. *Jones* (Fla.), 123 So. 920:

"While the driver of the car was undoubtedly guilty of negligence, in driving upon the crossing in front of the approaching train, we cannot hold in this case as was held in *Egly* v. *S. A. L. Ry. Co.*, 84 Fla. 147, 93, So. 170, and *Atlantic Coast Line R. Co.* v. *Gornto*, 89 Fla. 97, 103 So. 117, that such negligence, under the peculiar circumstances of the case, was the sole proximate cause of the collision and resulting injury. *Per Contra*, the evidence clearly shows negligence on the part of the defendant railway company which the jury might well have found, as they apparently did, proximately con-

tributed, along with the negligence of the driver of the automobile and of the plaintiff himself, to the causation of plaintiff's injury."

"* * * the rights and obligations of a railroad company and travelers on a public highway are reciprocal at the crossing of a railroad and public highway, but the railroad company's trains have the right of way, and all persons on the highway should give precedence to the passing trains of the railroad company at the crossings. It is therefore as much the duty of a person traveling upon the public highway, who is about to cross a railroad track, to use ordinary care and prudence to ascertain if a train is approaching upon the railroad track *as it is the duty of the railroad company to warn, by appropriate signals, all persons who may be upon the public highway of the approach of a train about to cross the public highway.*"

Seaboard Air Line Ry. Co. v. *Myrick*, 91 Fla. 918, 109 So. 193, 195.

Can it be said upon the facts disclosed by this record that the railroad company performed its *reciprocal* duty to Stringfellow? The law charges Stringfellow with a standard of care to be observed in approaching this crossing and likewise the law charges the railroad company with a standard of duty in approaching this crossing. The Florida Supreme Court recognizes this standard of care but likewise it recognizes a *standard of duty* upon the railroad company. As said in the Germak case, *supra*, after quoting the language of Mr. Justice Holmes in the Goodman case, *supra*, "This rule has reference to the *standard of conduct* required by law of persons in crossing railroad tracks. It does not relate to the *standard of duty* imposed upon railroad companies *or define the liability* of such companies under a statute like the one in Florida." The respective standards of conduct and duty are mutual, reciprocal, due from each to each.

The railroad company was as much charged with notice of the conditions surrounding this crossing as was Stringfellow. It was charged with knowledge of the obstructed view, charged with knowledge of the consequences and danger of driving its train over this crossing, through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards, charged with knowledge that because of a strong head wind it was made difficult for those using the street intersection to hear a train approaching from the south. It cannot be said upon this record, as a matter of law, that the railroad company, performed its *reciprocal standard of duty.* Otherwise the proof of the railroad cempany's negligence offered at the trial must be completely ignored.

The statute and decisions of Florida impose this *standard of duty* upon the railroad company along with the *standard of conduct* upon Stringfellow.

> "Likewise the defendant is held to knowledge of the obstruction to the view of approaching vehicles at or near the crossing, and in approaching the crossing should have given due and ample warning commensurate with the danger arising from the obstruction. See *So. Ry. Co.* v. *Mann,* 91 Fla. 948, 108 So. 889; *A. C. L. R. R. Co.* v. *Jones,* 98 Fla. 47, 123 So. 920."
>
> *Florida East Coast Ry. Co.* v. *Townsend* (Fla.), 140 So. 196, 198.

In the Watkins cases, *supra,* a recovery was allowed although the Supreme Court of Florida said, 121 So. at bottom of page 101: "While we think that both the company and its engineer were at fault in the lack of reasonable prudence with which the train was operated that point, the degree of negligence and lack of prudence shown by Mr. Watkins was *vastly greater.*"

> "The question of whether the defendant railroad company has failed to observe ordinary caution

through its agents, and whether such failure is the proximate cause of the injury is a question for the jury."

S. A. L. R. R. Co. v. *Myrick*, 91 Fla. 918, 109 So. 193.

"The question of negligence in the operation of a train at a crossing is one which must be resolved by consideration of many things, including condition of machinery and track in relation to speed, environment at point of accident, speed in relation to environment, and signals of the trains approach." *Atlantic Coast Line R. Co.* v. *Watkins*, 97 Fla. 350, 121 So. 95.

Seaboard Air Line Ry. Co. v. *Watson* (Fla.), 137 So. 719, 721.

We respectfully submit that because of these decisions and the evidence adduced upon the trial petitioner was entitled to have her case submitted to a jury because in the language of the majority opinion below (R. 96, 97) "there was substantial evidence, tending to prove that no warning by whistle or bell was given and that the train was being operated at a negligent and dangerous rate of speed, to support the conclusion that the collision would not have occurred if the warning had been given or if the train had been operated at a more moderate and reasonable rate of speed. It was for the jury, not the court, to say whether it was negligence to run the train through a populous community without warning, or at a speed so great that it could not be stopped within less than 100 yards; especially if because of a strong headwind it was made difficult for those using the street intersection to hear a train approaching from the south. * * * here it was opened for the jury to find that appellant's husband did not know or realize that a train was approaching. It does not appear in this case that the driver was racing with the train in an attempt to pass ahead of it over the crossing."

It was therefore open for the jury to find that respond-

ent was also guilty of negligence which contributed to Stringfellow's death. It cannot be said from the record that Stringfellow's negligence was more than a concurrent cause. The jury might well have found that his death was due in part to the negligence of respondent.

As said by Mr. Justice Roberts, in *Rocco* v. *Lehigh Valley R. Co.*, 77 Law Ed. 438, 440, decided February 6, 1933:

> "But it was open to the jury, as above shown, to find that the motorman of the train was also guilty of negligence which contributed to the collision. Rocco's infraction of the rule was a concurrent cause, but may not in any proper sense be held the primary cause of the accident. His negligence did not preclude a finding by the jury that his death was in part due to the negligence of the respondent's servants. The Act imposes liability upon the carrier for injury or death resulting 'in whole or in part' from the negligence of any of its officers, agents or employees (U. S. C. title 45, sec. 51)."

Section 7052, *supra*, likewise imposes liability upon the respondent in this case, for injury or death resulting *in whole or in part* from the negligence of any of its agents or employees.

Conclusion.

Petitioner therefore submits that there was evidence sufficient for the jury to reasonably have concluded that some appreciable negligence of the railroad company proximately contributed to the death of her husband, and under Section 7052, she was entitled to have the issues submitted to a jury.

Respectfully submitted,

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